

Me 74-2098
23 September 1974

OGC Has Reviewed

MEMORANDUM FOR: Mr. Warner

SUBJECT : Veto Action on H. R. 12471

1. The attached is a proposed request for veto of H. R. 12471 which assumes the bill will be passed in its present form. I do not know if this is the format by which to advise OMB that we request a veto, but I will check this out between now and the time we finalize the message.

2. Bob Saloschin of Justice today repeats his belief that Justice will recommend veto. The FBI and the Office of Legal Counsel, now headed by Antonin Scalia, Bob Dixon's successor, are opposed to the bill, and the Deputy Attorney General, when last contacted by Saloschin sometime back, also was firmly in opposition. Saloschin assumes that Justice, if it recommends veto, will also prepare a Presidential message which would indicate the President's willingness to approve a bill from which the objectionable provisions have been deleted. Saloschin says he thinks too little attention has been given to the cost feature, specifically, the prohibition against fees for review.

3. Bob Andrews of Defense advised that there are political considerations at work but he assumes that if Justice takes the lead in opposition to the bill, DOD will join in requesting a veto. DOD thinks the time limits are the worst provision of the bill.

4. Gene Malmborg of State advised that State believes the bill is, at least, liveable.


5. I advised all three that although Mr. Colby has not yet made a decision or been asked to do so, Mr. Warner is strongly in opposition to the bill and I felt it is almost certain we will recommend veto.

6. Saloschin also advises that the Conferees have scheduled another meeting for tomorrow but the only item up for consideration is the matter of sanctions against employees.

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7. Saloschin reported that Malcom Hawk had been advised from someone at OMB that the latter had taken a poll of State, Defense, and CIA and all three had indicated satisfaction with the bill or at least that it was acceptable. Saloschin did not know the name of the OMB representative. I told him this was incorrect as to CIA's views, and that I would attempt to learn who in CIA was contacted on the poll in order to get back a corrected report to OMB.

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Associate General Counsel

Attachment

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cc: 

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RHL:yet
9/23/74

Dear Mr.

The Central Intelligence Agency urgently recommends that the President veto H. R. 12471, the bill which would amend the Freedom of Information Act.

As you know, this and other agencies have expressed serious concern with various provisions of this bill throughout its legislative progress. These views culminated in the President's letter of August 20, 1974, to Senator Kennedy and Congressman Moorhead. Unfortunately, the Conferees' accommodation to President Ford's position was, in our view, so slight that it is necessary to recommend veto.

The two most serious defects are in the provisions for judicial review and those providing time frames for departmental action on requests for documents.

The bill would authorize the courts to "examine the contents of any agency's records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in" the Freedom of Information Act. As the President pointed out in his August letter, this provision "would risk exposure of our military or intelligence secrets and diplomatic relations because of

a judicially perceived failure to satisfy a burden of proof."

Indeed it would be difficult to overstate the problems which could result from a law permitting courts to determine the propriety of classified decisions. The government would be required to persuade the judge on the intelligence, diplomatic, and national security aspects of the information involved, a burden greatly aggravated by the lack of expertise in the courts. As President Ford pointed out in his August letter, the courts "are neither trained nor ordinarily adequately equipped to gauge the ramifications that a release of a document may have upon our national security," a view shared also by the Supreme Court. In considering certain questions involved in the award of a certificate to engage in foreign air commerce, in C. & S. Airlines v. Waterman Corp. 133 U.S. 103 (1948), the Court pointed out that decisions in these areas "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." The Court noted also that "the President both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts,

without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"
(emphasis supplied).

Judicial review of classified documents also causes serious difficulties in protecting the documents from disclosure in the process of the litigation itself. Indeed, even with the full cooperation of the court, we have experienced security leaks in the course of trial.

The requirement that an agency act on a request for documents within ten days, as provided by the bill, in many cases, if not most, would simply be impossible, and the slight relief from this deadline which the bill provides would by no means solve the problem. Documents involving intelligence or intelligence sources and methods usually cannot be determined by a quick reading to be safe for release and in most cases experienced intelligence officers must perform the review. Many intelligence documents include intelligence gathered from more than one source, often by more than one agency. To study such documents sufficiently to determine what sources and methods are involved, which agencies participated, and whether continued protection is needed requires time. Further, these unrealistic time frames compound the cost of administering the law, which would be high in any event. To meet the tight deadlines, agencies in some

cases will have to forego current work or hire additional people. Or if they fail to accomplish their search and review in timely fashion they could wind up faced with that chore in the course of litigation, an expense for the government and the requester which could have been avoided if reasonable review time had been available.

Many requests are in terms of "all documents relating to", which term alone requires exhaustive, time-consuming research to determine which documents fall within the request. Further, the bill apparently does not contemplate that a single agency or component might be the recipient of two or several, or indeed numerous, requests at the same time. The necessity to service one request could prevent responding to the others. But more importantly, the bill would require agencies to give priority to research and review of past activities at the expense of current business. The value of intelligence in great part depends on its timeliness. The proposed amendment by its short deadlines for action--thereby tying up resources--seriously threatens the ability of intelligence agencies to produce quality and timely intelligence.

JOHN S. WARNER
General Counsel

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93d Congress) HOUSE OF REPRESENTATIVES (Report
2d Session) (No. 93-

AMENDING SECTION 552 OF TITLE 5, UNITED STATES CODE,
KNOWN AS THE FREEDOM OF INFORMATION ACT

~~September~~

, 1974. Ordered to be printed.

~~Moorhead of Pennsylvania,~~

Mr. from the committee of conference,
submitted the following

C O N F E R E N C E R E P O R T

(to accompany H. R. 12471)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows: In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

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That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is deleted and the following substituted in lieu thereof:

"Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because

furnishing the information can be considered as primarily benefiting the general public.

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo, [and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section,] and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously

With respect to the withholding of the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends."

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member."

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

No such notice shall be given in any case of extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request--

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request."

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;"

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 (b) Section 552(b)(7) of title 5, United States Code, is

amended to read as follows:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency, in the course of a criminal or lawful national security intelligence investi- gation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) the results of each investigation conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

"The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) Notwithstanding section 551(1) of this title, for purposes of this section, the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, submit the following joint statement to the House and Senate in explanation of the effect of the action agreed upon by the managers and recommend in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, minor drafting and clarifying changes, and technical amendments.

STATEMENT OF MANAGERS -- H. R. 12471

Index Publication

The House bill added language to the present Freedom of Information law to require the publication and distribution (by sale or otherwise) of agency indexes ~~on a quarterly or more frequent basis~~ identifying information for the public

as to any matter issued, adopted, or promulgated after July 4, 1967, ~~(which is required by 5 U.S.C. 552(a)(2) to be made available or published.)~~ This includes final opinions, orders, agency statements of policy and interpretations not published in the Federal Register, and administrative staff manuals and agency staff instructions that affect the public unless they are otherwise published and copies offered for sale to the public. Such published indexes would be required for the July 4, 1967 period to date. Where agency indexes are now published by commercial firms, as they are in some instances, such publication would satisfy the requirements of this amendment so long as they

are made readily available for public use by the agency. ~~(indicating that the publication of indexes should be on a quarterly or more frequent basis,)~~ The Senate amendment contained similar provisions, ~~but~~ provided that if an agency determined by an order published in the Federal Register that its publication of ^{any} index would be "unnecessary and impracticable," it would not actually be required to publish the index. However, it would nonetheless be required to provide copies of such index on request at a cost comparable to that charged had the index been published.

The conference substitute follows the Senate amendment, except that if the agency determines not to publish its index, it shall provide copies on request to any person at a cost not to exceed the direct cost of duplication.

Identifiable Records

~~The House bill amends the present law to change the requirement that a request for information from an agency be for~~

Present law requires that a request for information from an agency be for "identifiable records." The House bill provided that the request only "reasonably describe" the records being sought.

~~Content of this document is classified "Secret" and is to be controlled and handled in accordance with the provisions of the Freedom of Information Act.~~

The Senate amendment contained similar language, but added a provision that when agency records furnished a person are demonstrated to be of "general public concern," the agency shall also make them available for public inspection and purchase, unless the agency can demonstrate that they could subsequently be denied to another individual under exemptions contained in subsection (b) of the Freedom of Information Act.

The conference substitute follows the House bill. With respect to the Senate proviso dealing with agency records ~~of "general public interest"~~, the conferees wish to make clear such language was eliminated only because they conclude that all agencies ~~(are presently obligated under the Freedom of Information Act to pursue)~~ such a policy under internal procedural regulations. ~~since it is the overall purpose of the Freedom of Information Act~~

Search and Copying Fees

The Senate amendment contained a provision, not included in the House bill, directing the Director of the Office of Management and Budget to promulgate regulations establishing a uniform schedule of fees for agency search and copying of records made available to a person upon request under the law. It also provided that an agency could furnish the records requested without charge or at a reduced charge if it determined that such action would be in the public interest. It also further

provided that no fees should ordinarily be charged if the person requesting the records was an indigent, if such fees would amount to less than \$3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.

The conference substitute follows the Senate amendment, except that each agency would be required to issue its own regulations for the recovery of the direct costs of search and duplication, instead of having such regulations promulgated by the Office of Management and Budget. In addition, the conference substitute retains the agency's discretionary public interest waiver authority, but eliminates the specific categories of situations where fees should not be charged. The conferees wish to make clear that they do not intend that fees be charged by any agency for facility services, examination, or review of requested records as part of the agency's determination ^{or portions thereof} whether or not to make such records available. They also do not intend to imply, by the elimination of the Senate language listing specific categories of situations where fees should not be charged, that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject ^{for} individual agency determination ⁱⁿ ~~the promulgation of regulations~~ ^{ing} implementing the Freedom of Information ~~Act~~ Act.

Court Review

The House bill clarifies the present Freedom of Information law with respect to de novo review requirements by Federal courts under section 552(a)(3) by specifically authorizing the court to examine in camera any requested records in dispute to determine whether the records are -- as claimed by an agency -- exempt under any of the nine categories of section 552(b) of the law.

The Senate amendment contained a similar provision authorizing in camera review by Federal courts and added another provision, not contained in the House bill, to authorize Freedom of Information suits to be brought in the Federal courts in the District of Columbia, even in cases where the agency records were located elsewhere.

The conference substitute follows the Senate amendment, providing that in determining de novo whether agency records have been properly withheld, the court may examine records in camera in making its determination under any of the nine categories of exemptions under section 552(b) of the law. In Environmental Protection Agency v. Mink, ^{410 U.S.} 410 U.S. 73 (1973), the Supreme Court ruled that in camera inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would generally be precluded in Freedom of Information cases, unless Congress deemed otherwise. H. R. 12471 amends the present law to permit such in camera examination, but the conferees do not intend by this subsection to require automatic in camera examination of disputed classified records in every case.

Response to Complaints

The House bill required that the defendant to a complaint under the Freedom of Information law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.

The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.

The conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown.

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Expedited Appeals

The Senate amendment included a provision, not contained in the House bill, to give precedence on appeal to cases brought under the Freedom of Information law, except as to cases on the docket which the court considers of greater importance.

The conference substitute follows the Senate amendment.

Assessment of Attorney's Fees and Costs

The House bill provided that a Federal court may, in its discretion, assess reasonable attorney fees and other litigation costs reasonably incurred by the complainant in Freedom of Information cases in which the Federal government has not prevailed.

The Senate amendment also contained a similar provision in cases in which the complainant had "substantially prevailed", but added certain criteria for consideration by the court in making such awards, including the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the government's withholding of the records sought had "a reasonable basis in law."

The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney's fees and litigation costs were eliminated. ~~The conferees did not intend, however, that award of attorney's fees be automatic.~~ The conferees con-

~~They~~ concluded that in exercising discretionary judgment under this subsection, the courts ^{should} ~~must~~ take into consideration such matters and other similar factors involved in each individual case ^{but} ~~but~~

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that such statutory criteria are unnecessary and potentially confusing since courts already have a body of law in such matters on which to base their decisions.

Sanction

The Senate amendment contained a provision, not included in the House bill, authorizing the court in Freedom of Information Act cases to impose a sanction of up to 60 days suspension from employment against a federal employee or official which the court found to have been responsible for withholding the requested records without reasonable basis in law.

The conference substitute follows the Senate amendment, except that the court is only authorized to make a finding whether circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously, and if the court so finds, the Civil Service Commission is responsible for initiating a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The Commission's findings and recommendations are to be submitted to the appropriate administrative authority and to the responsible official or employee, and that ~~the~~ agency shall take the disciplinary action recommended by the Commission.

Administrative Deadlines

The House bill required that an agency make a determination whether or not to comply with a request for records within 10 days (excepting Saturdays, Sundays, and legal public holidays) and to notify the person making the request of such determination and the reasons therefor, and the right of such person to appeal any adverse determination to the head of the agency. It also required that agencies make a final determination on any appeal of an adverse determination within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal. It also provided that any person shall be deemed to have exhausted his administrative remedies if the agency fails to comply with either of the two time deadlines.

The Senate amendment contained similar provisions, but authorized certain other administrative actions to extend these deadlines for another 30 working days under specified types of situations, if requested by an agency head and approved by the Attorney General. It also would grant an agency, under ^(specified) "unusual circumstances", a 10 working day extension ~~under certain specified situations~~ upon notification to the person requesting the records.

In addition, an agency could transfer part of the number of days from one category to another and authorize the court to allow still additional time for the agency to respond to the request.

The Senate amendment also provided that any agency's notification of denial of any request for records set forth the names and titles or positions of each person responsible for the denial. It also allowed the court, in a Freedom of Information action, to allow the government additional time if "exceptional circumstances" were present and if the agency was exercising "due diligence in responding to the request."

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The conference substitute generally adopts the 10 and 20 day administrative time deadlines of the House bill ~~and other~~ ~~language of the Senate amendment~~, but also incorporates the 10 working day extension of the Senate amendment for "unusual circumstances" in situations where the agency must search for and collect the requested records from facilities separate from the office processing the request, where the agency must search for, collect, and examine a voluminous amount of separate and distinct records demanded in a single request, or where the agency has a need to consult with another agency or agency unit having a substantial interest in the determination because of the subject matter contained. This 10 day extension may be invoked by the agency either during initial review of the request or during appellate review, but may not be invoked twice during review of the request. [The 30 working day certification provision of the Senate amendment was eliminated, but the conference substitute retained the Senate language requiring that any agency's notification to a person of the denial of any request for records set forth the names and titles or positions of each person responsible for the denial. The conferees intend that this listing include those persons responsible for the original determination to deny the information requested, as well as all other agency employees or officials who ^{were responsible} ~~for determinations at subsequent stages~~ in the decision. The conference substitute also retained the Senate language ^{giving} the court authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request and had been since the request was received.

11

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National Defense and Foreign Policy Exemption (b)(1)

The House bill amended subsection (b)(1) of the Freedom of Information law to permit [court review of withholding of information] [an agency exemption of matters]

authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy.

The Senate amendment contained similar language, but added "statute" to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit an agency exemption of matters specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy where they are, in fact, properly classified pursuant to such Executive order. The conferees state that this amendment, when combined with the authority conferred upon the Federal courts in this conference substitute for in camera examination of contested records as part of their de novo determination in Freedom of Information cases, will clarify Congressional intent with respect to certain issues raised by the Supreme Court in the case of E.P.A. v. Mink, et al., 410 U. S. 73 (1973).

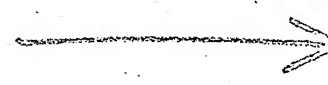
However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that ^(Federal courts) in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

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~~Restricted~~ Restricted Data (42 U.S.C. 2162), Communication Intelligence (18 U.S.C. 798), and Intelligence Sources and Methods (50 U.S.C. 403(d)(3) and g), are "born classified" and exempted under ^(section 552) ~~Exemption~~ (b)(3) of the Freedom of Information Act. If such information is ever subjected to court review, it is expected that in such cases the court will recognize that those agency heads are required by statute to protect this information and they do not have the latitude for discretion permitted under Executive Order 11652.

Investigatory Records

The Senate amendment contains an amendment ^{to} subsection (b)(7) of the Freedom of Information law, not included in the



House bill, that would clarify certain court interpretations of congressional intent which have tended to expand the scope of agency authority to withhold certain "investigatory files compiled for law enforcement purposes." The Senate amendment would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, disclose investigative techniques and procedures, ~~endanger the life or physical safety of law enforcement personnel.~~

The conference substitute follows the Senate amendment except for the substitution of "confidential source" for "informer", the addition of language protecting records compiled by a criminal law enforcement agency from a confidential source in the course of a criminal or lawful national security intelligence investigation, the deletion of the word "clearly" relating to avoidance of an "unwarranted invasion of personal privacy," and the addition of a category allowing withholding of information whose disclosure "would endanger the life or physical safety of law enforcement personnel."

The conferees wish to make clear that the scope of this exception against disclosure of "investigative techniques and procedures" should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques. Nor is this exemption intended to include records falling within the scope of subsection (a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public.

The substitution of "confidential source" is to make clear that the identity of a person other than a paid

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provided information under an express assurance of confidentiality or from which such an assurance could be reasonably implied. The information provided by such a source may not be withheld, however, but only his identity deleted, unless ~~the~~ the record involved was compiled by a criminal law enforcement agency in the course of a criminal or lawful national security ~~investigation~~ ^{intelligence} investigation, and unless the ~~information~~ information was furnished only by the confidential source. [Criminal law enforcement agency means the Federal Bureau of Investigation, the _____, and is to be strictly construed.] Personnel, regulatory, and civil enforcement investigations are not encompassed by this provision.

The conferees also wish to make clear that disclosure of information about a person to that person does not constitute an invasion of his privacy. As to the seventh ~~and the other exemptions~~ exemption, generally, the conferees do not intend the exceptions to disclosure to apply unless disclosure can reasonably be expected to cause ^{ANY OF} the harms specifically enumerated in the statute.

Segregable Portions of Records

The Senate amendment contained a provision, not included in the House bill, providing that any reasonably segregable portion of a record shall be provided to any person requesting such record after the deletion of portions of the record which may be held to be exempt under subsection (b) of the Freedom of Information law.

The conference substitute follows the Senate amendment.

Annual Reports by Agencies

The House bill provided that each agency submit an annual report, on or before March 1 of each calendar year, to the Speaker of the House and the President of the Senate, for referral to the appropriate committees of the Congress. Such report shall include statistical information on the number of agency determinations to withhold information requested under the Freedom of Information law, the reasons for such withholding, the number of appeals of such adverse determinations, the result and reasons for each, ~~those officials responsible for each denial, the numbers of cases in which each participated during the year,~~ a copy of every rule made by the agency in connection with this law, a copy of the agency fee schedule and the total amount of fees collected by the agency during the year, and other information indicating efforts to properly administer the Freedom of Information law.

(2) The Senate amendment contained similar provisions and added two, ~~that each agency report list those officials responsible for each denial~~ requirements not contained in the House bill, that the Attorney General also submit a separate annual report on or before March 1 of each calendar year listing the number of

14

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cases arising under the Freedom of Information law, the exemption involved in each such case, the disposition of the case, and the costs, fees, and penalties assessed under the law. The Attorney General's report shall also include a description of Justice Department efforts to encourage agency compliance with the law.

The conference substitute incorporates the major provisions of the House bill and ^{two} ~~the~~ Senate amendments ~~with respect to the Attorney General's annual report~~. With respect to the annual reporting by each agency of the names and titles or positions of each person responsible for the denial of records requested under the Freedom of Information law and the number of instances of participation for each, the conferees wish to make clear that such listing include those persons responsible for the original determination to deny the information requested in each case, as well as all other agency employees or officials ~~who were responsible for determinations of subsequent stages~~ who ~~contributed~~ in the decision. The conference substitute also requires an annual reporting of court and agency findings and action under section (a)(4)(F) relating to imposition of sanctions against government employees and officials under the law.

Expansion of Agency Definition

The House bill extends the applicability of the Freedom of Information law to include any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency.

15

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The Senate amendment provided that for purposes of the Freedom of Information law the term agency included any agency defined in section 551(1) of title 5, United States Code, and in addition included the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

The conference substitute follows the House bill. ~~the~~ ^{the} The conferees state that they intend to include within ~~the~~ ^{the} definition of "agency" the United States Postal Service, the Postal Rate Commission, and government corporations or government controlled corporations now in existence, or which may be created in the future. In addition, they state that the term "Executive Office of the President" is to be interpreted to include all ~~operating units~~ ^{CONTINUOUS} within that Office, but not ~~the personal communications between~~ the President's ~~and his~~ immediate personal staff.

Effective Date

Both the House bill and the Senate amendment provided for an effective date of 90 days after the date of enactment of these amendments to the Freedom of Information law.

The conference substitute adopts the language of the Senate amendment.

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600200005-3

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Remarks:

Herewith a proposed request for veto of H. R. 12471 and my memorandum of 23 September 1974 to Mr. Warner on that subject. See in particular paragraph 7.

[Handwritten signature]

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